Petition 13

Office - Supreme Court, U.
FILED
SEP 12
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1952

No. 334

SAMUEL JAMES GASWAY,
Petitioner,

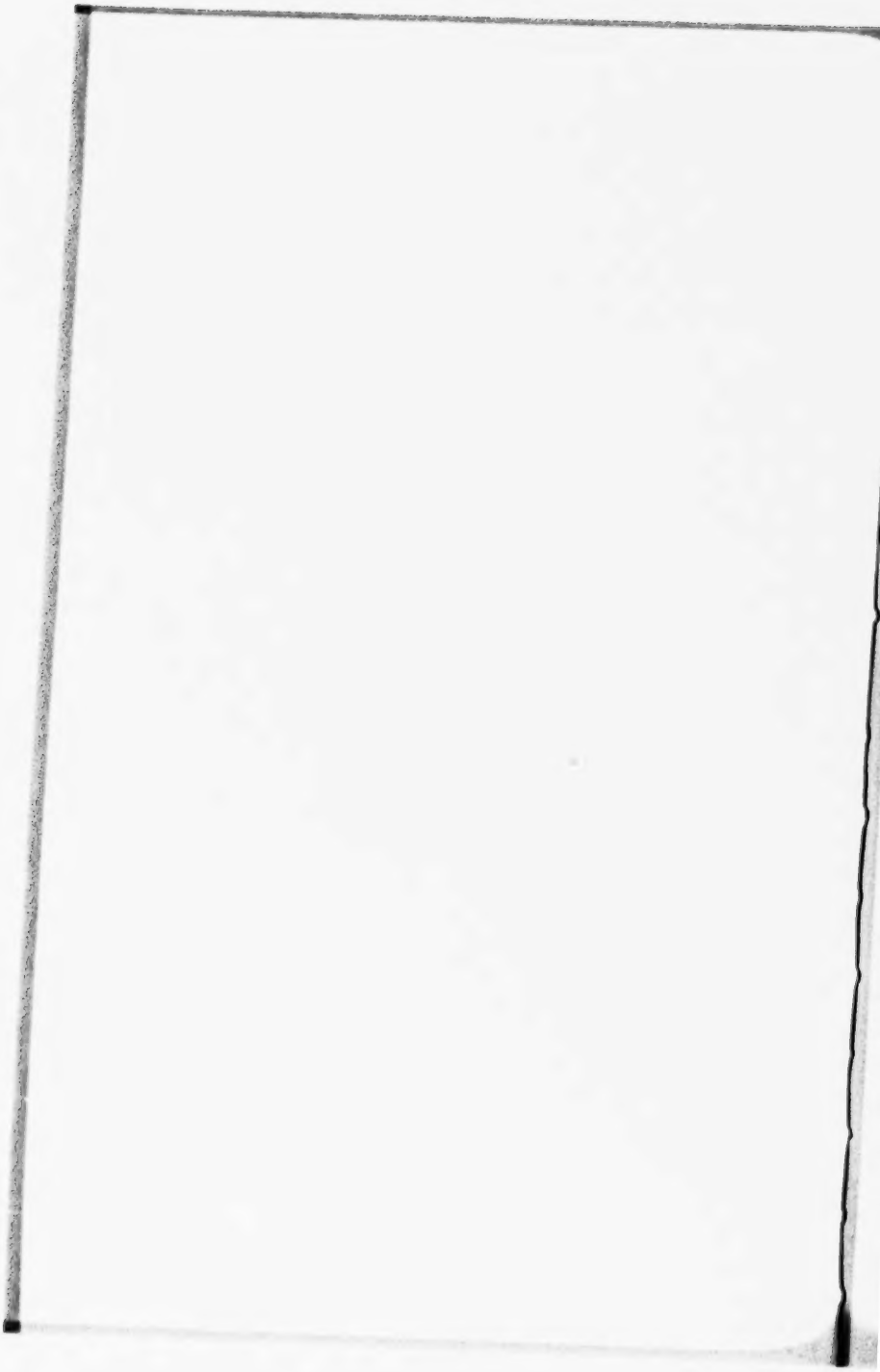
against

THE STATE OF TEXAS

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

GRAY THORON,
HAROLD W. OCHSNER,
Attorneys for Petitioner.

September 10, 1952



INDEX TO PETITION

	Page
Opinions Below	1
Jurisdiction	2
Constitutional Provision Involved	2
Statement of Case	2
Questions Presented	7
Reasons for Granting the Writ	8
1. The Texas Court of Criminal Appeals, in affirming the death sentence conviction imposed upon petitioner, has decided a federal question of substance in a way not in accord with applicable decisions of this court	8
II. The question is one of grave importance	12
Conclusion	13

TABLE OF AUTHORITIES

Cases:

	Page
Chambers v. Florida, 309 U. S. 227 (1940)	9
Gallegos v. Nebraska, 342 U. S. 55 (1951)	11, 12
Gasway v. State, 248 S. W. 2d 942 (Tex. Crim. App. 1952)	1
Golemon v. State, 247 S. W. 2d 119 (Tex. Crim. App. 1952)	9
Lomax v. Texas, 313 U. S. 544 (1941)	9
Malinski v. New York, 324 U. S. 401 (1945)	11
Ward v. Texas, 316 U. S. 547 (1942)	9
Watts v. Indiana, 338 U. S. 49 (1949)	9, 11, 12
White v. Texas, 310 U. S. 530 (1940)	9

Constitution:

Fourteenth Amendment of the Constitution of the United States: Section 1	2, 3, 6, 7, 9

Statute:

Texas Code of Criminal Procedure: Article 217	6
28 U. S. C. Section 1257(3)	2

Treatise:

Inbau: Lie Detection and Criminal Interrogation (2nd ed. 1948)	5

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1952

No. .....

SAMUEL JAMES GASWAY,
Petitioner,

against

THE STATE OF TEXAS

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of the State of Texas, finally affirming a death sentence conviction returned against petitioner in a prosecution for rape.

Opinions Below

The opinions of the Texas Court of Criminal Appeals, are reported in *Gasway v. State*, 248 S. W. 2d 942 (Tex. Crim. App. 1952) (R. 132-139, 141-142).

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

A death sentence judgment was entered against petitioner by the District Court of Potter County, Texas, on October 12, 1951 (R. 9-10), and was affirmed by the Texas Court of Criminal Appeals on April 9, 1952 (R. 140). Petitioner's motion for rehearing was overruled by the Court of Criminal Appeals on May 21, 1952 (R. 142).[1]

The Federal question sought to be reviewed was duly raised at the trial in the District Court (R. 86, 103, 105), and in two motions for a new trial (R. 10-11, 12-13). It was then urged on appeal before the Texas Court of Criminal Appeals, and was discussed by that Court in both its initial opinion (R. 135-138) and in its opinion overruling petitioner's moton for rehearing (R. 141).

Constitutional Provision Involved

This case involves the construction and application of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

STATEMENT OF THE CASE

The only question presented to this Court arises from the admission in evidence at the trial of two purported "confessions" over petitioner's objection

[1] By an appropriate order signed on August 13, 1952, the time for filing this petition for a writ of certiorari was extended to September 18, 1952 (R. 147).

(R. 86, 103, 105) that the "confessions" were involuntary and wrung from him by coercive methods which violated his rights guaranteed by the Fourteenth Amendment of the Constitution of the United States.

Petitioner was indicted and convicted for rape and assessed the death penalty (R. 9-10). His conviction followed a trial in which the following facts concerning the extraction of the "confessions" were not only undisputed, but were largely developed from the State's own witnesses. Petitioner here asserts that these admitted facts establish such mental coercion as to constitute a denial of due process. but concedes, as did his counsel at the trial (R. 64), that no element of actual physicial violence was involved.

Petitioner was apprehended without a warrant (R. 80) in Amarillo, Texas, at approximately 2:30 P. M. on Saturday, June 30, 1951, by the local Potter County sheriff's office (R. 21-23, 39). Shortly after petitioner's arrest, petitioner's mother consulted counsel (R. 20) and attempted to see petitioner in the Amarillo jail, where he was being held, but was prevented from seeing him by the sheriff (R. 23, 77). Almost immediately thereafter, petitioner was taken from the Amarillo jail by the sheriff and a deputy and was driven by them in an automobile to Austin, Texas (R. 18), a distance of over 500 miles (R. 87), to undergo questioning and lie detector tests.

During the period prior to his hasty[2] removal to

[2] The undue haste of petitioner's removal from Amarillo is further indicated by the Amarillo sheriff's admission that he knew the lie detector would not be available on the following day (R. 39-40, 79; cf. 53) and that the Amarillo jail was a wholly "safe" place of detention (R. 40).

Austin, petitioner had been questioned in the Amarillo jail by the sheriff (R. 39) and by the district attorney (R. 63, 94-95) concerning a criminal attack made in Amarillo on a nine-year-old girl five days earlier. During this questioning, petitioner was told that he should submit himself to a lie detector examination and sign a written form of consent to allow himself to be questioned while on the lie detector machine (R. 63). In the absence of advice from counsel or friends, he signed the form of consent which was given him (R. 123).

The drive to Austin was made at night, ending at about 5 A. M. Sunday, July 1st (R. 67-68, 81). On arriving in Austin, petitioner was immediately placed in solitary confinement in the local jail (R. 19, 40, 81), with strict orders from the Amarillo sheriff that no one was to be informed that petitioner was in Austin or was being there held (R. 41, 81). Petitioner was then kept in solitary confinement until Monday morning, July 2nd, when he was carried to the office of the Texas Department of Public Safety (R. 41, 68-69), given a tour through the Department's extensive crime detection museum by the Amarillo sheriff and his deputy (R. 41, 50-51, 82), and then subjected to a series of tests and questions on a polygraph lie detector (R. 42, 55-57).

It is not wholly clear from the record to what extent, during this period of incommunicado holding and questioning, suggestive use was made by the sheriff of the possibility of mob violence and by the lie detector operator of the possibility of use and the dangers of sodium penethol truth serum, as testified to by petitioner (R. 109-110, 112). However, the

sheriff did not deny discussing the possibility of mob violence with petitioner and in fact sought to excuse some of his actions by referring to an atmosphere of mob violence (R. 73, 83; cf. 29). The lie detector operator not only refused to deny that he had discussed the use of truth serum with petitioner, but expressly conceded "there was some possibility" he had (R. 120). Also, the sheriff testified that petitioner specifically said just before giving his first "confession": "You can forget that truth serum, I remember all of it and I will tell you all about it" (R. 93).

Petitioner was subjected to seven successive lie detector tests and much questioning during the morning (R. 42, 96-97), and further questioning during the early afternoon (R. 43, 56). Although the results of lie detector tests are considered so unreliable as to be generally inadmissible in evidence,[3] further coercive pressure was brought upon petitioner by his being told the machine showed he was lying (R. 43), which he consistently denied (R. 43). Finally, petitioner succumbed to the inquisitorial tactics of his questioners, after 48 hours of illegal detention. Stating that he would sign what the Amarillo sheriff wanted (R. 110-111), petitioner, in the presence of the sheriff, his deputy and the lie detector operator, signed a statement typewritten by the sheriff (R. 47). This statement was the so-called "first confession" (R. 128-132).

[3] See cases collected in Inbau: *Lie Detection and Criminal Interrogation*, pp. 83-86 (2nd ed. 1948). Inbau estimates the accuracy of lie detector tests at only 75%, *"even when the best available instrument and methods are employed by skilled and competent examiners."* (Emphasis in original.) *Id.* at p. 86.

Petitioner was thereupon again taken at night by automobile, by the Amarillo sheriff and deputy, about 500 miles (R. 87) to Plainview, Texas, where at 2 A. M. on Tuesday morning, July 3rd, he was placed in the Plainview jail for about six hours (R. 71-72, 82), following which he was finally returned by automobile to Amarillo, where he was taken to the private home of a Justice of the Peace (R. 31-32), purportedly to avoid the possibility of mob violence (R. 26, 29). Here, after approximately 67 hours of unlawful detention,[4] a warrant was finally issued for his arrest. Immediately thereafter, "surrounded by a group of police officers" (R. 45; cf. 83-84) and the district attorney (R. 75), prompted by the sheriff (R. 113-114; cf. 111), and without "time or opportunity to seek counsel" (R. 45), the so-called "second confession" was taken from him (R. 45), in essentially the same form as the first one (R. 84, 124-132).

At the trial these two purported "confessions" were admitted in evidence over petitioner's objection that they had been extracted from him by coercive methods while secretly held incommunicado without advice of friends or counsel, in violation of his rights under the Fourteenth Amendment (R. 86, 103, 105). Petitioner took the stand in his own defense and specifically denied the truth of that part of the two

---

[4] Petitioner's detention was illegal under Texas law, since he had been arrested without a warrant or order and had not thereafter been taken "immediately" before a magistrate as required by Article 217 of the Texas Code of Criminal Procedure, which reads ". . . the person making the arrest shall immediately take the person arrested before the magistrate who may have ordered the arrest, or before the nearest magistrate where the arrest was made without an order."

"confessions" in which he had purportedly admitted perpetrating the attack on the little girl (R. 106-107). He also explained that he had felt compelled to sign the untrue "confessions" since the compulsive treatment accorded him made it clear to him that he was "going to be forced" (R. 115; cf. 108-117).

QUESTIONS PRESENTED

The basic and important constitutional question here presented involves the scope of petitioner's rights under the due process clause of the Fourteenth Amendment. This question is:

Did the Texas courts, in imposing the death sentence upon petitioner following the admission in evidence of two purported "confessions", violate petitioner's rights under the Fourteenth Amendment, since the "confessions" were extracted from him by the use of coercive methods specifically calculated to produce such confessions?

Because the answer turns on an analysis of the undisputed facts surrounding the extraction of each of the two "confessions", it is appropriate to restate this question in further detail, as follows:

1. As to the first "confession":

Does the constitutional guarantee of due process prohibit a death sentence conviction following the admission in evidence of a purported "confession" extracted from petitioner at a time when he had been held continuously incommunicado, without advice of friends or counsel, following an arrest without warrant and 48 hours of illegal detention, during which period he had been hastily transported at night by police officials, solely for the purpose of questioning,

over 500 miles from the place of his residence and arrest to a distant city where he had been placed in solitary confinement for 28 hours before being subjected to repeated lie detector tests and other forms of questioning and pressure?

2. As to the second "confession":

Does the constitutional guarantee of due process prohibit a death sentence conviction following the admission in evidence of a purported second "confession" extracted from petitioner at a time when the same influences which prompted the giving of the first "confession" were not only still continuing but were actually intensified by a further unbroken incommunicado holding without advice of friends or counsel, to a total of 67 hours, by a second night trip with police officers of about 500 miles, by a period of about 6 hours in a third jail, and by a 70 mile trip with police officers to a private home, where a second purported "confession" substantially similar to the first "confession" was then extracted in the presence of the district attorney and a number of police officials?

REASONS FOR GRANTING THE WRIT

I. The Texas Court of Criminal Appeals, in Affirming the Death Sentence Conviction Imposed upon Petitioner, has Decided a Federal Question of Substance in a way not in Accord with Applicable Decisions of this Court.

In holding that neither of the two "confessions" were extracted from petitioner in violation of his constitutionally protected rights, the Texas Court of

Criminal Appeals has acted in conflict with the decisions of this Court in *Watts v. Indiana*, 338 U. S. 49 (1949), *Ward v. Texas*, 316 U. S. 547 (1942), *Lomax v. Texas*, 313 U. S. 544 (1941), *White v. Texas*, 310 U. S. 530 (1940) and *Chambers v. Florida*, 309 U. S. 227 (1940), all of which recognize the improper coercive effect of various of the non-physical coercive techniques used to bring about petitioner's two purported "confessions". All hold that the subsequent admission in evidence of a "confession" so induced constitutes a violation of the rights of due process guaranteed by the Fourteenth Amendment.

The Texas Court of Criminal Appeals has itself very recently recognized the conflict of its views with those of this Court. In another death sentence case, that of *Golemon v. State*, 247 S. W. 2d 119, 121 (Tex. Crim. App. 1952), now pending before this Court on its miscellaneous docket for review by certiorari, the Texas Court stated, respecting the use of coercive techniques in obtaining confessions:

> "The principal difference in the approach to a determination of the question by each of the courts lies in the fact that this court does not agree that force, coercion and involuntariness are shown by some of the fact situations which have prompted the Supreme Court of the United States to conclude to the contrary. White v. Texas, 310 U. S. 530, 60 S. Ct. 1032, 84 L. Ed. 1342; Lomax v. Texas, 313 U. S. 544, 61 S. Ct. 956, 85 L. Ed. 1511; Ward v. Texas, 316 U. S. 547, 62 S. Ct. 1139, 86 L. Ed. 1663."

Mr. Justice Byrnes, speaking for a unanimous Court in *Ward v. Texas*, 316 U. S. 547, 555 (1942)

clearly summarized some of the coercive factors, which would be sufficient cause for reversal of a conviction based upon a purported "confession" wrung from a defendant by non-physical means:

> "This Court has set aside convictions based upon confessions extorted from ignorant persons who have been subjected to persistent and protracted questioning, or who have been threatened with mob violence, or who have been unlawfully held incommunicado without advice of friends or counsel, or who have been taken at night to lonely and isolated places for questioning. *Any one of these grounds would be sufficient cause for reversal.* All of them are to be found in this case." (Emphasis added.)

It is of course impossible to determine the precise effect of each of the various coercive techniques here utilized, viz.: the incommunicado holding (e.g. R. 23, 41, 71-72, 81), depriving petitioner of the right of advice of friends and counsel (e.g. R. 20, 23, 45), moving him hastily at night from jail to jail over a long distance for the purpose of questioning on a lie detector (e.g. R. 19, 87), the suggestive use of the possibility of mob violence (R. 112) and the use of other forms of non-physical pressures (e.g. R. 41, 45, 109-110, 120), all of which were used in the process of extracting the purported "confessions." However, in cases where life or liberty are placed in jeopardy, no court should speculate as to the exact extent of the pressure produced by the inherently coercive techniques used for the express purpose of producing a "confession." Such speculation is particularly inappropriate in the case at bar where the

death penalty has in fact been n assessed, after the purported "confessions" were u used to destroy the effect of testimony favorable to to petitioner (Cf. R. 13, 15).[5]

As Mr. Justice Frankfurter st stated in his opinion in *Watts v. Indiana*, 338 U. S. 49 49, 53 (1949):

> "A confession by which life ife becomes forfeit must be the expression of free e choice. A statement to be voluntary of course se need not be volunteered. But if it is the proc oduct of sustained pressure by the police it does s not issue from a free choice. When a suspect s speaks because he is overborne, it is immaterial al whether he has been subjected to a physical or r a mental ordeal. Eventual yielding to questionin ing under such circumstances is plainly the prod duct of the suction process of interrogation and therefore the reverse of voluntary."

While this Court has recently ly held that mere illegal detention is not alone suffi icient to constitute a

[5] Also see pp. 1-9 of petitioner's s motion for rehearing before the Texas Court of Criminal A Appeals, which appears in the original typewritten reco ord certified to this Court but which was omitted fro m the printed record pursuant to a stipulation betwee en counsel (R. 145-146). Reference to the unprinted p portions of the certified record is, however, expressly permit itted by the stipulation (R. 146). Of course the existence of a conflict in testimony is not strictly relevant to the federal question of due process raised by this petition, since a reve ersal is required, even with unchallenged evidence adequate to convict, whenever an improperly obtained confession is in fact admitted in evidence. *Malinski v. New York*, 324 4 U. S. 401 (1945); see *Gallegos v. Nebraska*, 342 U. S. 55, 63 (1951). The sharp conflicts in testimony at petitioner's trial serve dramatically to emphasize the inappropriateness of leaving to speculation the precise subjective extent of the coercive pressures to which petitioner was subjected for the express purpose of producing a "confession."

constitutional denial of due process, *Gallegos v. Nebraska*, 342 U. S. 55 (1951), the illegal action of the police, in arresting petitioner without a warrant and in holding him without a preliminary appearance before a magistrate as required by state law, is still recognized by this Court as one of the elements to be considered in determining whether a confession has been obtained under such circumstances that its use violates due process. See *Gallegos v. Nebraska*, 242 U. S. 55, 65 (1951); cf. *Watts v. Indiana*, 338 U. S. 49, 54 (1949).

For the past 15 years, this Court has repeatedly recognized that the use of "confessions" is fraught with great dangers and must be closely controlled to prevent the all too frequent abuses from over-zealous police officers and prosecutors. To hold that the coercive methods here used to produce the two "confessions" which led to petitioner's death sentence are proper, woud result in encouraging further use of subtle third degree police methods in criminal proceedings and lead to an unfortunate erosion of the broad protections and standards heretofore laid down by this Court.

II. The Question Is One of Grave Importance.

Since this is a death sentence case in which petitioner's life has become forfeit as a result of an apparent disregard of the constitutional standards of due process, the grave importance of the question is manifest. However, this question is also of importance far beyond the case sought to be reviewed. It raises the problem of securing uniformity among the states in the recognition of the scope of constitution-

ally protected rights affecting life and liberty, and of clarifying the extent of these protections in cases involving the improper non-physical coercive techniques frequently used in extracting "confessions" from individuals suspected of crime.

CONCLUSION

For the foregoing reasons, it is respectfully urged that this petition for a writ of certiorari to the Court of Criminal Appeals of the State of Texas should be granted.

GRAY THORON,
HAROLD W. OCHSNER,
Attorneys for Petitioner.

September 10, 1952

OCT
CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 334

SAMUEL JAMES GASWAY,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRICE DANIEL
Attorney General of Texas

CALVIN B. GARWOOD, JR.
Assistant Attorney General
Attorneys for Respondent,
The State of Texas.

INDEX

	Page
Preliminary Statement	1
Statement of the Case	3
Point One	7
The admission of petitioner's two confessions into the evidence at his trial did not deny him due process of law.	
Argument and Authorities	8
Conclusion	15
Appendix	16

TABLE OF AUTHORITIES

Cases:

	Pages
Abston v. State, 141 S. W. 2d 337	8
Ashcraft v. Tennessee, 322 U. S. 143	8
Brown v. Mississippi, 297 U. S. 278	8
Cantu v. State, 135 S. W. 2d 705	9
Canty v. Alabama, 309 U. S. 629	8
Chambers v. Florida, 309 U. S. 227	8, 9, 11
Colley v. State, 158 S. W. 2d 1014	8
Dimery v. State, 240 S. W. 2d 293	13
Gallegos v. Nebraska, 72 S. Ct. 141	12, 13, 14
Gasway v. State, 248 S. W. 2d 942	1, 3
Gipson v. State, 181 S. W. 2d 76	9
Haley v. Ohio, 332 U. S. 596	8
Harris v. South Carolina, 338 U. S. 68	8
Lisenba v. California, 314 U. S. 219	12, 13
Lomax v. State, 144 S. W. 2d 555	10
Lomax v. Texas, 313 U. S. 544	8, 9, 10
Lyons v. Oklahoma, 322 U. S. 596	12, 14
Malinski v. New York, 324 U. S. 401	8
McNabb v. United States, 318 U. S. 332	12
Prince v. State, 231 S. W. 2d 419	8
Shook v. State, 244 S. W. 2d 220	13
Stewart v. State, 64 S. W. 2d 782	9
Stroble v. California, 72 S. Ct. 599	12
Taylor v. State, 147 S. W. 2d 800	9
Turner v. Pennsylvania, 338 U. S. 62	8
Upshaw v. United States, 335 U. S. 410	12
Vernon v. Alabama, 313 U. S. 547	8
Ward v. Texas, 316 U. S. 547	8, 9, 10
Watts v. Indiana, 338 U. S. 49	8, 9, 10, 11
White v. Texas, 310 U. S. 530	8, 9, 11

Statutes:

Texas Code of Criminal Procedure (Vernon 1948)	
Art. 217	12
Art. 726	8, 16
Art. 727	6, 16, 17
Art. 727a	8, 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 334

SAMUEL JAMES GASWAY,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Petitioner was charged by indictment (R. 1) and found guilty of rape (R. 9, 10) after a trial in the 47th District Court of Potter County, Texas. He was sentenced to death by electrocution (R. 10). Upon appeal to the Court of Criminal Appeals of Texas, the conviction was affirmed and two motions for rehearings overruled.[1]

Here petitioner assigns as error the admission of two allegedly involuntary confessions into the evi-

[1] *Gasway v. State*, 248 S. W. 2d 942 (Tex. Crim. 1952).

dence at his trial. Because of this, he asserts that he was denied due process of law.

There is no substantial dispute in the evidence of the circumstances under which each confession was made. Petitioner does not claim that he was physically abused or even threatened with mistreatment. Instead it is asserted that the mere sequence of events constituted some form of psychological pressure which induced the petitioner to confess his guilt and thus render his statements inadmissible in evidence under the due process clause of the Fourteenth Amendment. However, the facts contained in the record of this case conclusively establish that each of petitioner's confessions was free from the taint of any form of coercion, psychological or otherwise. And in the absence of coercion the most that may be said for petitioner's complaint is that he made one confession while held in violation of a Texas statute. While this, of course, is one factor which may be considered in determining the admissibility of any purported confession, it is well established that illegal detention alone is not a sufficient ground to render it inadmissible.

The petitioner has been extended every constitutional and statutory privilege to which one charged with a capital offense is entitled. The issue of the voluntariness of a confession is one of fact to be resolved by the jury acting under a proper instruction from the court. Such was the procedure followed in the trial of this case, and the question of coercion, if we consider that such could have been seriously presented, was decided adversely to the petitioner.

STATEMENT OF THE CASE

The facts concerning the offense itself are of no importance to a determination of the issues presented here and may be found in detail on pages 943 and 944 of the opinion below.[2] Suffice it to say that petitioner was convicted of the rape of a nine year old girl whom he enticed into his automobile after having accosted her while she was delivering newspapers on the outskirts of Amarillo, Texas.[3] He made two detailed confessions of guilt, and testified in his own behalf at his trial. As a witness, he admitted that certain portions of his confessions were true, denied the veracity of some and "couldn't remember" others. The Court of Criminal Appeals found the evidence adduced at the trial strong enough to support the conviction even without the added strength of the confessions in question.[4]

The crime was widely publicized in Amarillo and its environs, and after several days' intensive investigation the Sheriff's Department received a tip to the effect that petitioner might be the guilty party. On Saturday, June 30, 1951, several of the Sheriff's deputies called at petitioner's home and talked to his mother, but being informed that he was elsewhere they left word for him to call Sheriff Gaither upon his return (R. 21, 22). When he returned home, petitioner called the Sheriff and then walked over to his office (R. 22, 107). This was about 2:30 in the afternoon.

---

[2] This portion of the opinion below may also be found R. 132-135.

[3] Petitioner's confessions may be found R. 124-132.

[4] 248 S. W. 2d at p. 944.

Petitioner was placed in a "line-up" in the county jail and identified by the prosecutrix as her attacker (R. 17, 65). Shortly thereafter he acceded to a suggestion that he go to Austin, the State Capital and headquarters of the Texas Department of Public Safety, and take a lie detector test (R. 39, 63, 94). Apparently the Department possesses the only polygraph machine in the State; at any rate, there are none of these devices in Potter County (R. 50). Petitioner asked to take the test (R. 39), and before he went to Austin he voluntarily executed a written agreement to do so (R. 123). His mother was informed of these plans before he left (R. 23, 77).

At this juncture it should be noted that another suspect in the same case had been taken to Austin for a similar test only a few days before. He had been tentatively identified by the prosecutrix but was cleared by the polygraph and released upon his return to Amarillo (R. 53).

Late Saturday afternoon Sheriff Gaither, his deputy Carthel, and petitioner started for Austin (R. 18, 68), where they arrived early the next morning (R. 19, 66). The primary motive for the immediate departure and subsequent trip at night was to avoid the Texas summer heat (R. 40). A lie detector test is accurate only if the subject is well rested, and a 500 mile automobile trip in the heat of a July day in Texas is exhausting. It is true that in Austin petitioner was placed in a jail cell by himself, but this accomodation was in no way comparable to those which are commonly used for punishment purposes in penitentiaries (R. 19). He did not complain of any sort of discomfort while in "solitary." The offi-

cers accomodated him thus merely because they wanted him to have 24 hours of rest before undergoing the polygraph test the next morning (R. 40, 68). This is substantiated by the testimony of the polygraph operator to the effect that he would not test any person who was not completely rested (R. 58).

Petitioner took the lie detector test on Monday morning, and it was administered by a technician, not a police officer (R. 57, 95). The test lasted approximtely one hour and fifty minutes, of which forty-eight minutes were consumed by questioning, and the remaining sixty-eight by brief intervals of rest (R. 96, 97). Petitioner was not threatened or browbeaten in any way (R. 56, 57), and during the course of the test he was allowed to smoke, take refreshment, and to go to the rest room (R. 97). At the termination of the test, the petitioner and his custodians had lunch in the employees' cafeteria at the Department of Public Safety headquarters (R. 43, 70) and then returned to the polygraph room, where petitioner had a brief private conference with the technician (R. 43, 57, 70). After a few minutes he emerged and told the Sheriff he wanted to make a statement.

The petitioner was informed that the polygraph indicated that he had lied on key questions (R. 42), and being confronted with this he decided to make his first confession.[*] He was told that his statement must be entirely free and voluntary and duly

[*] The operator testified, contrary to petitioner's assertion in his footnote 3, that the polygraph used by the Department of Public Safety had proven 99.26 per cent accurate on past performances (R. 101).

warned that anything he might say could be used against him later (R. 47). The confession was made in the presence of three witnesses and was not given in exchange for any sort of promise of future leniency.*

Later in the day petitioner, Gaither and Carthel started back to Amarillo and spent Monday night in Plainview, a town along their route (R. 44, 49, 71). They arrived in Amarillo the next morning and went directly to the home of Mrs. Ivy Wilkinson, a Justice of the Peace, to file formal charges against petitioner (R. 24, 31, 72). The complaint was filed first and then petitioner made his second confession, this time to the District Attorney (R. 32, 72). Again he was duly warned that his statement must be purely voluntary and that it could later be used against him (R. 32). Shortly after this, the Sheriff went to petitioner's home and informed his mother of the events which had transpired since she had last seen him (R. 77).

There is no doubt but that petitioner was exceptionally well treated during all of this time. The Sheriff testified that "I have known him since he was a kid." (R. 76). Petitioner's mother testified that she had been told on Saturday afternoon that her son was going to Austin to take the lie detector test (R. 23). He was well cared for both going and returning (R. 20, 67, 72), and on the way back he was treated to a two dollar steak at the expense of Potter County (R. 71). He did not object to taking the poly-

* In accordance with Article 727, Texas Code of Criminal Procedure (Vernon 1948), reproduced in the Appendix, pages 16, 17.

graph test, but, on the contrary, he wanted to do so (R. 99). Neither was he mistreated or intimidated when he returned to Amarillo and made his second confession. Mrs. Wilkinson, the Justice of the Peace, testified that petitioner was "treated royally," and that "I even served soft drinks." R. 30).

There is some dispute in the evidence concerning discussions of the possibility of petitioner taking sodium penethol, the "truth serum" but if the subject was brought up at all, it appears that petitioner expressed a definite desire to take the drug (R. 44, 92, 93, 121, 122). He himself testified, "I told him it sounded all right with me, that I wasn't worried about sodium penethol." (R. 110)

The court below his reviewed the facts in a concise and lucid manner (R. 136-1[illegible]), and we have perhaps belabored them too exhaustively. However, this was done only in the effort to include references appropriate portions of the record and to demonstrate the utter lack of any evidence of coercive tactics on the part of petitioner's custodians. Perhaps the most important conclusion that may be drawn from a review of these facts relates to the intent of the Sheriff in taking petitioner to Austin. The two men were acquaintances of many years' standing, and only a few days before, another suspect in the same case was set free on the basis of the result of a similar polygraph test.

POINT ONE

The admission of petitioner's two confessions into the evidence at his trial did not deny him due process of law.

ARGUMENT AND AUTHORITIES

The admission of an involuntary confession into the evidence of a state criminal trial denies the accused due process of law.[7] Both this Court and the Texas Court of Criminal Appeals properly abhor coerced confessions, and a Texas statute[8] allows such a statement to be used in evidence only if made freely and without compulsion. Another statute[9] renders inadmissible evidence obtained in violation of the Constitution of the United States, and the Court of Criminal Appeals has never been reluctant to reverse a conviction if the undisputed facts show that the accused was compelled to confess his guilt.[10] A glance at the cases cited in the preceding footnote also reveals that the Texas Court has based its conclusions upon the pertinent decisions of the Supreme Court of the United States.

In Texas the initial question of the admissibility of a confession is for the court to decide. But when

---

[7] *Harris v. South Carolina*, 338 U. S. 68 (1949); *Turner v. Pennsylvania*, 338 U. S. 62 (1949); *Watts v. Indiana*, 338 U. S. 49 (1949); *Haley v. Ohio*, 332 U. S. 596 (1947); *Malinski v. New York*, 324 U. S. 401 (1945); *Ashcraft v. Tennessee*, 322 U. S. 143 (1944); *Ward v. Texas*, 316 U. S. 547 (1942); *Vernon v. Alabama*, 313 U. S. 547 (1941); *Lomax v. Texas*, 313 U. S. 544 (1941); *White v. Texas*, 310 U. S. 530 (1940); *Canty v. Alabama*, 309 U. S. 629 (1940); *Chambers v. Florida*, 309 U. S. 227 (1940); *Brown v. Mississippi*, 297 U. S. 278 (1936).

[8] Article 726, Texas Code of Criminal precedure (Vernon 1948), reproduced in the appendix, page 16.

[9] Article 727a, Texas Code of Criminal Procedure (Vernon 1948), reproduced in the appendix, page 16.

[10] *Prince v. State*, 231 S. W. 2d 419 (Tex. Crim. 1950); *Colley v. State*, 158 S. W. 2d 1014 (Tex. Crim. 1942); *Abston v. State*, 139 Tex. Crim. 416, 141 S. W. 2d 337 (1940).

the voluntary or involuntary character of the confession becomes an issue of fact, the question must be submitted to the jury by appropriate instructions. A verdict of guilty thus constitutes a finding that the statement was voluntarily made." The circumstances under which a prisoner has confessed his guilt will also be examined by this Court. In ruling on the admissibility of a confession in terms of due process of law, the Court will predicate its conclusions upon an independent examination of the undisputed facts in the record."

In the instant proceeding, there is practically no dispute as to the nature of the circumstances surrounding either of the two confessions which were used in evidence. As a witness at his own trial and as a petitioner to this Court, Gasway has admitted that he was treated considerately. His chief custodian was a personal friend of many years' standing, who, instead of perpetrating some subtle form of psychological coercion to elicit a confession of guilt, was apparently attempting to give petitioner every possible opportunity to clear himself.

In view of the total absence of any evidence indicating that petitioner was mistreated, the cases upon which he relies" can harly be considered to be in point. A brief examination of the facts of these cases dis-

---

" *Gipson v. State*, 147 Tex. Crim. 428, 181 S. W. 2d 76 (1944); *Taylor v. State*, 141 Tex. Crim. 212, 147 S. W. 2d 800 (1941); *Cantu v. State*, 141 Tex. Crim. 99, 135 S. W. 2d 705 (1940); *Stewart v. State*, 124 Tex. Crim. 632, 64 S. W. 2d 782 (1933).

" Citations at note 7, *supra*.

" *Watts v. Indiana*, 338 U. S. 49 (1949); *Ward v. Texas*, 316 U. S. 547 (1942); *Lomax v. Texas*, 313 U. S. 544 (1941); *White v. Texas*, 310 U. S. 530 (1940); *Chambers v. Florida*, 309 U. S. 227 (1940).

closes that each reversal was predicated on circumstances which are not at all comparable to those upon which petitioner places reliance here.

The petitioner in the *Watts* case was held illegally for six days. He was subjected to successive night-long ordeals of questioning by relay after relay of police officers, and for two days he was kept in a solitary jail cell described as "the hole," in view of the accommodations it provided. "Disregard of rudimentary needs of life—opportunities for sleep and a decent allowance of food—are also relevant."[11] At length the accused succumbed to such inquisitorial tactics and made the statement sought by the officers.

In the *Ward* case it was admitted that the accused, an ignorant Negro farm hand, had been slapped by a constable at least once, and that he remained in the custody of that particular officer for some time thereafter. For three days he was moved from jail to jail, from one strange town to another, all of this time being taken farther and farther from the scene of the crime. When the confession was finally obtained, he and his custodians were at a point some 110 miles distant from where he should have been held in custody. The only apparent reason for this tour was to frighten and intimidate the accused."[12]

The facts upon which the Court predicated reversal in the *Lomax* case are not readily discernible from the opinions of the Courts,[13] but it does appear

---

[11] 338 U. S. at p. 53.

[12] 316 U. S. at pp. 550, 551.

[13] This Court delivered only a brief *per curiam* opinion without a recitation of the facts. For this information, reference is made to *Lomax v. State*, 144 S. W. 2d 555, 563, 564 (Tex. Crim. 1940).

that the petitioner had been forced to submit to an interrogation standing up and stripped of his clothing. In the *White* case, the accused was repeatedly removed from jail for nightly trips "out on the road" and "off of the road" into the woods for questioning. A local peace officer testified that he was taken from jail in this manner so many times that the exact number could not be recalled.[17] The petitioners in the *Chambers* case were subjected to protracted questioning "under circumstances that were calculated to break the strongest nerves and the stoutest resistance." After steadfastly maintaining their innocence for five days, they finally broke down and confessed after an all night interrogation.[18]

"A statement to be voluntary of course need not be volunteered."[19] Certainly the record before us cannot be said to reflect the mistreatment, intimidation, and abuse to which the petitioners in the foregoing cases were subjected. The petitioner does not claim that he was subjected to any sort of protracted "grilling" by successive shifts of police officers. Only during the polygraph test in Austin was he subjected to any sort of serious interrogation. This was apparently done at his own request, and he gave his written consent to take the test. Petitioner was interrogated by a scientifically trained technician who conducted the test as carefully as a physician would make a medical examination. Being confronted with the result that he had been lying on key questions, he decided to make his confession.

---

[17] 310 U. S. at pp. 532, 533.
[18] 309 U. S. at pp. 238, 239.
[19] *Watts v. Indiana, supra,* p. 53.

The vast majority of cases in which petitioners presented unsuccessful complaints of coerced confessions have doubtless been disposed of by denial of certiorari, and it would add nothing to this brief to compile those cases here. However, there are several recent decisions in which this Court has affirmed such convictions with written opinions.[9] In each one of these cases there was presented a much more convincing argument for reversal than that which is raised in the instant proceeding.

In the absence of undisputed evidence or even a strong allegation of coercion, the only complaint left open to petitioner is the fact that he made his first confession before he was formally charged with the commission of the crime.[10] A confession obtained under these circumstances is, of course, inadmissible in a federal trial,[11] but this so-called rule of the *McNabb* case does not limit the power of a state court to admit or exclude evidence. This Court made that clear in the *McNabb* case itself.[12] Texas has specifically rejected the doctrine and holds that a confession made before charges are filed must be

---

[9] *Stroble v. California*, 72 S. Ct. 599 (1952); *Gallegos v. Nebraska*, 72 S. Ct. 141 (1951); *Lyons v. Oklahoma*, 322 U. S. 596 (1944); *Lisenba v. California*, 314 U. S. 219 (1941).

[10] Article 217, Texas Code of Criminal Procedure (Vernon 1948), reads as follows:

> "In each case enumerated in this chapter, the person making the arrest shall immediately take the person arrested before the magistrate who may have ordered the arrest, or before the nearest magistrate where the arrest was made without an order."

[11] *Upshaw v. United States*, 335 U. S. 410 (1948); *McNabb v. United States*, 318 U. S. 332 (1943).

[12] 318 U. S. at p. 340.

excluded only if there is a causal connection between the failure to file a complaint and the securing of the confession." The Court of Criminal Appeals did not find any such casual connection in the case at bar.

Any question as to the applicability of *McNabb* rule to state criminal trials was conclusively settled by this Court in its recent decision in *Gallegos v.* Nebraska." There the accused, a Mexican farm hand who could neither read nor write English, was illegally detained for 25 days. During the course of this detention he confessed that he had slain his paramour. However, there was no undisputed evidence that he had been compelled to make his confession, so it was held that the issue of federal due process was not properly raised. In other words, the mere fact that the accused confessed before charges were filed did not of itself render his statement inadmissible as a matter of law.

"Illegal acts, as such, committed in the course of obtaining a confession, whatever their effect on its admissibility under local law, do not furnish an answer to the constitutional question which we must decide."" To exclude the confessions in the instant proceeding after sustaining the admissibility of those used in the respective trials of the *Gallegos* and *Lisenba* cases would certainly be inconsistent.

What has been stated above is applicable only to the question of the admissibility of petitioner's first confession. As to his second confession, he cannot

---

" *Shook v. State*, 244 S. W. 2d 220 (Tex. Crim. 1951); *Dimery v. State*, 240 S. W. 2d 293 (Tex. Crim. 1951).
" 72 S. Ct. 141 (1951).
" *Lisenba v. California, supra*, p. 235.

even raise the objection of illegal detention, for it was not made until after he had been formally charged with the commission of the crime. Although there were two confessions used in evidence at petitioner's trial, this proceeding is not analagous to the "two confession" cases[77] because here both of the confessions were purely voluntary. In the absence of an involuntary first confession there is no necessity for an inquiry into the possible effect of the circumstances under which it was made upon any subsequent statements of the accused.

"A criminal prosecution approved by the state should not be set aside as violative of due process without clear proof that such drastic action is required to protect federal constitutional rights."[78] Such drastic action is not required here. Acting under an instruction to find petitioner not guilty if it had any reason to believe that either of his confessions was not purely voluntary (R. 6), the jury found him guilty as charged. Thus the issue of coercion has already been resolved against him, and the mere fact that the confessions were made while petitioner was in the custody of the police does not render them inadmissible.

Due process of law, as applied to the trial of one charged with a crime, requires only that fundamental fairness which is essential to our basic concepts of justice. No such fundamental principle of justice was violated during the trial of this proceeding.

---

[77] Cf. *Lyons v. Oklahoma, supra.*

[78] *Gallegos v. Nebraska, supra,* p. 145.

CONCLUSION

It is respectfully submitted that this case is not a proper one for review by this Court and that the petition for writ of certiorari should be denied.

PRICE DANIEL
Attorney General of Texas

CALVIN B. GARWOOD, JR.
Assistant Attorney General
Attorneys for Respondent,
The State of Texas.

October, 1952.

APPENDIX

TEXAS STATUTES REGARDING CONFESSIONS

Texas Code of Criminal Procedure (Vernon 1948):

Article 726. Confession.

"The confession of a defendant may be used in evidence against him if it appear that the same was freely made without compulsion or persuasion, under the rules hereafter prescribed."

Article 727. When confession shall not be used.

"The confession shall not be used if, at the time it was made, the defendant was in jail or other place of confinement, nor while he is in the custody of an officer, unless made in the voluntary statement of accused, taken before an examining court in accordance with law, or be made in writing and signed by him; which written statement shall show that he has been warned by the person to whom the same is made: First, that he does not have to make any statement at all. Second, that any statement made may be used in evidence against him on his trial for the offense concerning which the confession is therein made; or, unless in connection with said confession, he makes statements of facts or circumstances that are found to be true, which conduce to establish his guilt, such as the finding of secreted or stolen property, or the instrument with which he states the offense was committed.

If the defendant is unable to write his name, and signs the statement by making his mark, such statement shall not be admitted in evidence, unless it be witnessed by some person other than a peace officer, who shall sign the same as a witness."

Article 727a. Evidence not be be used.

"No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case."